

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Amendment of Part 95 of the)	WT Docket No. 98-169
Commission's Rules to Provide)	
Regulatory Flexibility in the)	
218-219 MHz Service)	
)	
)	

ORDER ON RECONSIDERATION

Adopted: November 24, 1999

Released: November 30, 1999

By the Commission:

1. In this *Order on Reconsideration*, on our own motion, we alter the restructuring plan adopted in the *218–219 MHz Report and Order* in the above-captioned proceeding, FCC 99-239, which was released on September 10, 1999.¹

I. BACKGROUND

2. In the *218–219 MHz Report and Order*, among other things, we adopted a

¹ Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, *Report and Order and Memorandum Opinion and Order*, WT Docket No. 98-169, FCC 99-239 (released Sept. 10, 1999) ("*218–219 MHz Report and Order*").

restructuring plan for existing 218-219 MHz licensees that were current in installment payments (*i.e.* less than ninety days delinquent) as of March 16, 1998, or those licensees that had properly filed grace period requests under the former installment payment rule. (Eligible Licensees). The restructuring plan offered three options to provide specific relief for licensees that wish to retain their license but are experiencing financial hardship or that wish to return their licenses due to an inability to assume their financial responsibilities. The three options are:

(1) Reamortization and Resumption of Payments; (2) Amnesty, and (3) Prepayment, whereby an Eligible Licensee may prepay the principal of any license it wishes to retain with cash and prepayment credits generated from down payments on spectrum returned to the Commission and any installment payments previously made.² Our order allowed an Eligible Licensee electing the Amnesty option to choose either to receive no credit for its down payment, but remain eligible to bid on the surrendered licenses when they are subsequently offered in auction, with no restriction on after-market acquisitions; or obtain a credit for seventy percent of its down payment and forego for a period of two years, from the start date of the next auction of the 218-219 MHz Service, eligibility to reacquire the surrendered licenses through either auction or any secondary market transaction.³

II. DISCUSSION

3. It was not our original intent to adopt the seventy percent credit contained in the *218-219 MHz Flex NPRM*,⁴ therefore, on our own motion, for the following reasons, we correct the prior error. On review, it is apparent that, under the Amnesty option, allowing an Eligible Licensee to obtain credit for its down payment and forego reacquiring surrendered licenses for a period of two years is inconsistent with our responsibility to protect the integrity of the auction program and promote new and innovative uses of spectrum. Giving a seventy percent credit on down payments associated with returned spectrum, without an adequate counterbalancing public interest benefit, would undermine the integrity of the auction process by relieving participants of even the most basic obligation of their participation.

² *218-219 MHz Report and Order*, at ¶¶ 32, 40-53.

³ *Id.*, at ¶ 46-48.

⁴ Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service and Amendment of Part 95 of the Commission's Rules to Allow Interactive Video and Data Service Licensees to Provide Mobile Services (proceeding terminated), *Order, Memorandum Opinion and Order, and Notice of Proposed Rulemaking*, 13 FCC Rcd 19064, 19086 (1998) ("*218-219 MHz Flex NPRM*").

4. However, we recognize that we allow for a credit on down payments in other portions of the *218-219 MHz Report and Order*. Specifically, an Eligible Licensee who elects the Prepayment option is eligible for an eighty-five percent credit on its down payment.⁵ It is important to note that an Eligible Licensee who elects the prepayment option is providing a public benefit through early payment of its financial obligations. Nevertheless, under the Prepayment option, the Commission retains an amount equal to the three percent default payment.⁶ Thus, as an Eligible Licensee electing the Amnesty option is not providing the same public benefit, it would not be in the public interest to allow it a seventy percent credit on its down payment.⁷

5. The *218-219 MHz Report and Order* increased the flexibility of the 218-219 MHz service and extended the license term in order to encourage new and innovative uses in the marketplace and expedite service to the public. In the *218-219 MHz Report and Order*, the only restriction on reacquisition applied to those Eligible Licensees opting for the seventy percent credit. Thus, as the seventy percent credit is no longer available, Eligible Licensees electing Amnesty will not be precluded from reacquiring licenses at auction or in the secondary market. This result is appropriate as Eligible Licensees electing amnesty may still have viable business plans to implement based on spectrum they may acquire in future auctions or in the secondary market. A two-year restriction on the acquisition of certain spectrum may negatively impact an otherwise viable business plan. Our action in this *Order on Reconsideration* moots the comments of EON Corporation seeking to broaden the disqualification period to exclude the future acquisition of any 218-219 MHz Service licenses to be auctioned in the ensuing two-year period. As we stated in the *218-219 MHz Report and Order*, limiting the reacquisition of spectrum or acquisition of additional spectrum by Eligible Licensees would not be in the public

⁵ *218-219 MHz Report and Order*, at ¶ 53.

⁶ Fifteen percent of the twenty percent down payment equals three percent of the purchase price. See 47 C.F.R. § 1.2104(g)(2).

⁷ We also distinguish for the same reasons the circumstances under which we provided a credit on down payments for returned C block licenses where the licensees elected to prepay retained or disaggregated licenses. Similarly, we distinguish that aspect of the disaggregation option in C block whereby a licensee could apply a portion of the half of the down payment associated with the returned part of the license to reduce the debt on the retained part. In such case, the licensee is not abandoning its efforts to serve the public with at least part of the spectrum that it had committed itself to develop. Amendment of the Commission's Rules Regarding Installment Payment Financing For Personal Communications Services, (PCS), *Order on Reconsideration of the Second Report and Order*, FCC No. 98-46, 13 FCC Rcd. 8345, at ¶¶ 37, 51-52 (rel. March 24, 1998) ("*C Block Reconsideration Order*").

interest.⁸

6. For the above reasons, we modify the *218-219 MHz Report and Order*. Therefore, while we will not give Eligible Licensees electing amnesty a credit for down payments associated with spectrum returned to the Commission, neither will we limit the reacquisition of spectrum or the acquisition of additional spectrum.

III. ORDERING CLAUSES

7. Accordingly, IT IS ORDERED that, pursuant to Section 1.108 of the Commission's rules, 47 C.F.R. Section 1.108, we reconsider on our own motion our decision in Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, *Report and Order and Memorandum Opinion and Order*, WT Docket No. 98-169, FCC 99-239 (released Sept. 10, 1999), regarding amnesty and resumption of payment in the 218-219 MHz service, as detailed herein.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

⁸ *218-219 MHz Report and Order*, at ¶ 48.

APPENDIX A
SUPPLEMENTAL FINAL REGULATORY FLEXIBILITY ANALYSIS

Order on Reconsideration

As required by the Regulatory Flexibility Act (“RFA”),⁹ an Initial Regulatory Flexibility Analysis (“IRFA”) was incorporated in the Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service and Amendment of Part 95 of the Commission's Rules to Allow Interactive Video and Data Service Licensees to Provide Mobile Services, *Order, Memorandum Opinion and Order, and Notice of Proposed Rulemaking*.¹⁰ The Commission sought written public comment on the proposals in the *218-219 MHz Flex NPRM*, including comment on the IRFA. A Final Regulatory Flexibility Analysis (“FRFA”) was included in the Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, *Report and Order and Memorandum Opinion and Order*.¹¹ In this *Order on Reconsideration*, we issue this supplemental Final Regulatory Flexibility Analysis (“supplemental FRFA”) which conforms to the RFA.¹²

I. Need for, and Objectives of, the Order on Reconsideration:

⁹ See 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et. seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (“CWAAA”). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (“SBREFA”).

¹⁰ Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service and Amendment of Part 95 of the Commission's Rules to Allow Interactive Video and Data Service Licensees to Provide Mobile Services (proceeding terminated), *Order, Memorandum Opinion and Order, and Notice of Proposed Rulemaking*, 13 FCC Rcd 19064, 19101 (1998) (“*218-219 MHz Flex NPRM*”).

¹¹ Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, *Report and Order and Memorandum Opinion and Order*, WT Docket No. 98-169, FCC 99-239 (rel. Sept. 10, 1999) (“*218-219 MHz Report and Order*.”).

¹² See 5 U.S.C. § 604.

In the *218-219 MHz Report and Order*, among other things, we adopted a restructuring plan for existing 218-219 MHz licensees that were current in installment payments (*i.e.* less than ninety days delinquent) as of March 16, 1998, or those licensees that had properly filed grace period requests under the former installment payment rule. (“Eligible Licensees”). The restructuring plan offered three options to provide specific relief for licenses that wish to retain their license, but are experiencing financial hardship, or that wish to return their licenses due to an inability to assume their financial responsibilities. Under one of these options, Amnesty, an Eligible Licensee could choose either to receive no credit for its down payment, but remain eligible to bid on the surrendered licenses when they are subsequently offered in auction, with no restriction on after-market acquisitions; or obtain a credit for seventy percent of its down payment and forego for a period of two years, from the start date of the next auction of the 218-219 MHz Service, eligibility to reacquire the surrendered licenses through either auction or any secondary market transaction.¹³

On review, it is apparent that, under the Amnesty option, allowing an Eligible Licensee to obtain credit for its down payment and forego reacquiring surrendered licenses for a period of two years is inconsistent with our responsibility to protect the integrity of the auction program and promote new and innovative uses of spectrum. Giving a seventy percent credit of the down payments associated with returned spectrum would undermine the integrity of the auction process by relieving participants of even the most basic obligation of their participation. Further, a two-year restriction on the reacquisition of the surrendered license unduly restricts the number of potential licenses, and is inconsistent with a fair and equitable auction process.

II. Summary of Significant Issues Raised by Public Comments in Response to the Initial Regulatory Flexibility Analysis:

Previously, no petitions were filed in direct response to the IRFA or the FRFA in this proceeding. Thus, on our own motion, we have issued this *218-219 MHz Reconsideration Order*.

III. Description and Estimate of the Number of Small Entities to which the Rules Apply:

Previously, in the FRFA, pursuant to the RFA, we provided a detailed description and estimate of the number of small entities that may be affected by the proposed rules, if adopted.¹⁴ We noted that the *218-219 MHz Report and Order* affects a number of small entities who are either licensees, or who may choose to become applicants for licenses, in the 218-219 MHz Service. Such entities fall into two categories. The first category consists of those using the 218-219 MHz Service for providing interactivity capabilities in conjunction with broadcast services. In the FRFA, with respect to the first category, we estimated that the number of small business entities operating in the 218-219 MHz band for interactivity capabilities with television viewers in the 218-219 MHz Service which will be subject to the rules will be less than 612.¹⁵ The second category consists of those using

¹³ *Id.* ¶ 46-48.

¹⁴ *218-219 MHz Report and Order*, at 85-86 (Appendix C).

¹⁵ *Id.*, at 86.

the 218-219 MHz Service to operate other types of wireless communications services with a wide variety of uses, such as commercial data applications and two-way telemetry services. In the FRFA, with respect to the second category, we estimated that the number of small entities that would provide wireless communications services other than that described above would be 247 or less.¹⁶

On January 6, 1998, the SBA approved of the small business size standards established in the *Competitive Bidding Tenth Report and Order*.¹⁷ As we described in the FRFA, the first auction of 218-219 MHz spectrum resulted in 170 entities winning licenses for 594 Metropolitan Statistical Area (“MSA”) licenses. Of the 594 licenses, 557 were won by entities qualifying as a small business.¹⁸

IV. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements:

Previously, in the FRFA to the *218-219 MHz Report and Order*, we adopted rules altering the reporting and recordkeeping requirements for a number of small business entities. The rules changed the obligations of 218-219 MHz Service licensees with respect to license renewal, construction reports, and acquisitions by partitioning or disaggregation. As we noted in the FRFA, the *218-219 MHz Report and Order* contained three options relevant to some small businesses that will alter their reporting and recordkeeping requirements. Our reconsideration order is relevant only to the second option. Specifically, non-defaulting 218-219 MHz Service licensees currently participating in the installment payment plan may elect one of three restructuring plans concerning their outstanding payments. However, our reconsideration order does not alter any reporting, recordkeeping, or other compliance requirements contained in the *218-219 MHz Report and Order*.

V. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered:

As we described in detail in the FRFA to the *218-219 MHz Report and Order*, we adopted final rules designed to maximize opportunities for participation by, and growth of, small businesses in providing wireless services. We noted that we expected that the extension of license terms from five to ten years and allowing partitioning and disaggregation of licenses will specifically assist small businesses. We also noted that the *218-219 MHz Report and Order* contained provisions, such as liberalization of construction requirements and technical restrictions, and elimination of the cross-ownership restriction, that will assist all licenses, including small business licensees.¹⁹

In this *Order on Reconsideration*, we change the options available to those small businesses electing the

¹⁶ *Id.*

¹⁷ See Letter to Daniel B. Phythyon, Chief, WTB, from Aida Alvarez, Administrator, SBA, Dated Jan. 6, 1998.

¹⁸ *218-219 MHz Report and Order*, at 86 (Appendix C).

¹⁹ *Id.*, at 88.

Amnesty option in the restructuring plan. *The 218-219 MHz Report and Order* allowed an Eligible Licensee electing the Amnesty option to choose either to receive no credit for its down payment, but remain eligible to bid on the surrendered licenses when they are subsequently offered in auction, with no restriction on after-market acquisitions; or obtain a credit for seventy percent of its down payment and forego for a period of two years, from the start date of the next auction of the 218-219 MHz Service, eligibility to reacquire the surrendered licenses through either auction or any secondary market transaction.²⁰ We recognize that some commentators proposed a more liberal amnesty option.²¹ However, we believe that eliminating all adverse financial consequences of a licensee's decision to participate in the auction would be contrary to a fair and equitable auction process. Further, it might encourage future licensees to participate in an auction under the assumption that the Commission will relieve it of the most basic obligations of participation in an auction, if, in the future, its business plans do not prove profitable. Thus, we will not provide the licensees with a seventy percent down payment credit. However, to the extent that a licensee believes that it can create a valuable business with the same license, if its debt burden were smaller, it will not be precluded from acquiring the license at auction, or in any secondary market transaction. For these reasons, we did not consider any significant alternatives to our proposals to minimize significant economic impact on small entities.

Report to Congress: The Commission will send a copy of the *Order on Reconsideration*, including this FRFA, in a report to be sent to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, *see* 5 U.S.C. § 801(a)(1)(A). In addition, the Commission will send a copy of the *Order on Reconsideration*, including FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the *Order on Reconsideration* and supplemental FRFA (or summaries thereof) will also be published in the Federal Register. *See* 5 U.S.C. § 604(b).

²⁰ *Id.* ¶ 46-48.

²¹ *See* Comments Corrected reply Comments of IVDS Coalition at 14.